82-574

No. 82____

IN THE

Supreme Court of the United States

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OCTOBER TERM, 1982

NANCY L. STEVENSON AND L. MARION GRESSETTE,
APPELLANTS

versus

SOUTH CAROLINA STATE CONFERENCE OF BRANCHES OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, INC., *et al.*, AND RICHARD W. RILEY, GOVERNOR OF THE STATE OF SOUTH CAROLINA, *et al*, APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

JURISDICTIONAL STATEMENT

RANDALL T. BELL,
Post Office Box 11390,
Columbia, South Carolina
29211
(803) 799-9800
Counsel of Record
for Appellants.

Of Counsel:
ROBERT E. STEPP,
Post Office Box 11390,
Columbia, South Carolina 29211,

JAMES P. FIELDS, JR.,
Post Office Box 142,
Columbia, South Carolina 29202.

The R. L. Bryan Company, Legal Printers, Columbia, S. C.

QUESTION PRESENTED

In fashioning a remedy for malapportionment, is a Federal District Court at liberty to ignore a longstanding provision of the South Carolina Constitution requiring Congressional Districts to be comprised of whole counties, where county lines can be preserved without violating the principle of "one man, one vote"?

PARTIES TO THE PROCEEDING

The action below was commenced by the South Carolina State Conference of Branches of the National Association for the Advancement of Colored People, Inc.; William F. Gibson, its President; and Adele Thompson Adams, Carol Camellia Singletary, Rev. George R. Couser, Robert S. Logan, Madie Robinson, Frank B. Washington, David I. Lucas, and S. T. Peden. The individual plaintiffs were identified in the complaint as black registered voters in the State of South Carolina. These parties are referred to herein as "Plaintiffs".

The defendants below were Richard W. Riley, Governor of the State of South Carolina; Nancy Stevenson, Lieutenant Governor of the State of South Carolina; L. Marion Gressette, President *Pro Tempore* of the South Carolina Senate; Raymon Schwartz, Jr., Speaker of the South Carolina House of Representatives; Robert J. Sheheen, Chairman of the Judiciary Committee of the South Carolina House of Representatives; and James Ellisor, Executive Director of the South Carolina Elections Commission.

Defendants Riley, Schwartz, Sheheen and Ellisor were jointly represented below, and are sometimes referred to in the opinions and orders below and herein as the "House Defendants". Appellants Stevenson and Gressette are sometimes referred to below as the "Senate Defendants".

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SOUTH CAROLINA STATE CONFERENCE OF BRANCHES OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, INC., *et al.*, AND RICHARD W. RILEY, GOVERNOR OF THE STATE OF SOUTH CAROLINA, *et al*, APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

JURISDICTIONAL STATEMENT

OPINIONS AND ORDERS BELOW

The three-judge district court on March 8, 1982, entered a preliminary order and opinion on the merits of this action. A copy of this order is attached hereto as Appendix A. Following a further submission to the court by House Defendants, a final order dated April 30, 1982 was entered. A copy of this order is attached hereto as Appendix B. Plaintiffs subsequently sought an injunction from the district court against the implementation of the court ordered reapportionment plan. That application was denied by the district court on June 2, 1982. A copy of that order is attached hereto as Appendix C. A similar application addressed to this Court was denied on June 7, 1982, as is reflected by the letter attached hereto as Appendix D.

JURISDICTION

On October 14, 1981, plaintiffs below initiated this action challenging the apportionment of South Carolina's congressional districts under Article I, Section 2 of the United States Constitution and the Voting Rights Act of 1965, 42 U. S. C. Section 1973, *et seq.*

A three-judge district court was convened pursuant to 28 U. S. C. § 2284. The court took evidence and heard arguments of counsel on February 11, 1982.[1]

On March 8, 1982, the district court entered its preliminary order which agreed in principle with a reapportionment plan submitted by House Defendants, but which required that it be modified.

In accordance with the directives of the court, House Defendants on March 16, 1982, submitted additional infor-

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[1] The instant case was consolidated for hearing on the merits with a similar action brought by different plaintiffs. The opinions and orders of March 8, 1982 and April 30, 1982 referred to above dealt with the consolidated cases. Plaintiffs in the companion case have not appealed from those orders.

mation to the court in connection with the modification of the plan. On April 30, 1982, the court ordered the plan as modified into effect.

On May 24, 1982, plaintiffs below appealed from this order and the preliminary order of March 8, 1982. Plaintiffs sought but were denied an injunction against the implementation of the plan by the district court on June 2, 1982, and by this Court on June 7, 1982.

Plaintiffs' Jurisdictional Statement was received on October 4, 1982. Appellants rely on Rule 12.4 of the Rules of the Supreme Court of the United States to initiate this cross-appeal from the orders entered by the three-judge court on March 8, 1982 and April 30, 1982.

Jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1253.

AUTHORITIES INVOLVED

Article I, Section 2 of the United States Constitution provides as follows:

> **§2. House of Representatives; how constituted; power of impeachment.**
>
> The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.
>
> No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen.
>
> Representatives and direct taxes shall be apportioned among the several states which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to ser-

vice for a term of years, and excluding Indians not taxed, three fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every thirty thousand, but each state shall have at least one representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five and Georgia three.

When vacancies happen in the representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies.

The House of Representatives shall choose their speaker and other officers; and shall have the sole power of impeachment.

Section 2 of the Fourteenth Amendment to the United States Constitution provides as follows:

§ 2. Apportionment of representatives in Congress.

Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear

to the whole number of male citizens twenty-one years of age in such state.

Article VII, Section 9 of the South Carolina Constitution provides as follows:

> § 9. **Election district; body corporate.** Each County shall constitute one election district, and shall be a body politic and corporate.

Article VII, Section 13 of the South Carolina Constitution of 1895 provides as follows:

> § 13. **Judicial and Congressional Districts; voting precincts.** The General Assembly may at any time arrange the various Counties into Judicial Circuits, and into Congressional Districts, including the County of Saluda, as it may deem wise and proper, and may establish or alter the location of voting precincts in any County.

STATEMENT OF THE CASE

Article VII, Section 9 of the South Carolina Constitution of 1895 provides that "[e]ach County shall constitute one election district. . . ." Article VII, Section 13 of the South Carolina Constitution further provides, in pertinent part:

> The General Assembly may at any time arrange the various counties into Judicial Circuits, and into Congressional Districts . . . as it may deem wise and proper . . . .

Pursuant to those constitutional requirements, every congressional district created by the South Carolina General Assembly since 1902 has been composed of entire counties. Not once has a county been divided among two or more districts.

Following receipt of population data from the 1980 census, the General Assembly of South Carolina began consideration of congressional reapportionment during the

1981 legislative session. No agreement between the two chambers was reached at that time, however, and the matter was deferred until the January 1982 session.

Plaintiffs brought this action in October of 1981, after the 1981 session of the legislature had adjourned without enacting a plan. House Defendants and Appellants urged the court to defer action until the General Assembly had an opportunity to act during the 1982 session.

Congressional reapportionment was the first major business taken up by the House and the Senate when the 1982 session convened in January. Again the two chambers were unable to agree on a plan. With time running out, a plan of last resort which divided Berkeley County between two districts was passed by the South Carolina House of Representatives. In deference to the requirements of the above-quoted state constitutional provisions, the South Carolina Senate declined to approve any proposed plan of congressional redistricting which did not preserve county lines. With the legislature thus deadlocked, the three-judge court was convened, took evidence and heard arguments on the merits on February 11, 1982.

At the hearing below, Appellants did not offer or support any particular plan. Rather, Appellants urged the district court to adopt a plan which satisfied the requirements of Article I, Section 2 of the United States Constitution, while preserving the integrity of county lines as required by the South Carolina Constitution. The House Defendants presented as their proposed plan the so-called "0.28" Plan which divided Berkeley County and which had passed the South Carolina House.

In its orders of March 8, 1982 and April 30, 1982, the three-judge court rejected Appellants' contention that deference to state constitutional law in this area was required

where Article I, Section 2 of the United States Constitution was not violated. The three-judge court recognized the substantial interest of the State in the preservation of county lines, but was of the opinion that Article VII, Section 13 of the South Carolina Constitution was permissive rather than mandatory. The district court further held that, in any case, state constitutional provisions were not binding upon a federal court seeking to remedy a violation of Article I, Section 2.

The Plaintiffs in this case and the plaintiffs in the companion case below both proposed plans for adoption by the district court which preserved county lines. The Plaintiffs' plan had a total population variance of 2.61%, while the plan proposed in the companion case had a variance of 1.55%. In addition, the Appellants, at the request of the district court, identified several plans which preserved county lines *and* resulted in lower population variances than either of the plans proposed by the plaintiffs in the two cases. The only plan with a lower variance than all of the plans identified by Appellants, was the so-called "0.28" Plan proposed by the House Defendants; but, it, of course, split county lines.

Although House Defendants supported the so-called "0.28" Plan which divided Berkeley County, they recognized the legitimacy of the State's interest in preserving county lines:

> Regarding the State's policy as to redistricting, no plan that was adopted by either the House or the Senate failed to respect county lines either completely or in large measure. In observing county lines in the construction of congressional districts, both houses of the legislature adhered to an eighty-year practice regarding congressional redistricting and acted pursuant to Article V, [sic] Section 13 of the State Constitution.

Brief below of Defendants Riley, Schwartz, Ellisor and Sheheen, at 16-17.

No party below seriously disputed that plans identified by Appellants, ranging from 0.73% to 2.37% in total population variance, satisfied the "one man, one vote" principle of *Wesberry v. Sanders*, 367 U. S. 1 (1964). No party disputed that the preservation of county lines in congressional redistricting has been a longstanding and unvaried state practice under Article VII, Section 13 of the South Carolina Constitution.[2] Despite the lack of controversy on these points, the district court ignored settled state law and policy in favor of a plan which violates county lines. From that decision Appellants now appeal.

THE QUESTION PRESENTED IS SUBSTANTIAL

This appeal presents a substantial question of constitutional law in the area of reapportionment. At issue is the relationship between federal and state law in the electoral process. The case offers this Court an opportunity to clarify and reaffirm important principles suggested in prior reapportionment decisions, but not developed sufficiently to give proper guidance to lower federal courts.

The district court in this case held that

> ... South Carolina's constitutional provision addresses the power of the legislature. It has nothing to do with the power of this court, and it is relevant to our decision only insofar as it may be read as an expression of a general state policy against dividing counties in the course of congressional redistricting.

Order of March 8, 1982, at 7. This holding is in direct conflict with recent decisions of other federal courts dealing

[2] In addition to their 2.61% Plan, Plaintiffs proposed two plans which violated county lines. However, they did not dispute the fact that county lines have been observed in every congressional reapportionment since the ratification of the South Carolina Constitution in 1895.

with judicial reapportionment. *See, e.g., Jordan v. Winter,* 541 F. Supp. 1135 (N. D. Miss. 1982); *Boyer v. Gardner,* 540 F. Supp. 624 (D. N. H. 1982); *Wisconsin A.F.L.-C.I.O. v. Elections Board,* 543 F. Supp. 630 (E. D. Wis. 1982); *O'Sullivan v. Brier,* 540 F. Supp. 1200 (D. Kan. 1982).

In view of prior decisions of this Court, the district court's judgment should be reversed. State constitutional law should not be disregarded by federal courts where it can be applied without violating federal constitutional principles. No conflict between the state and federal constitutions is present on the facts of this case, and the district court's failure to adhere to Article VII, Section 9 and Article VII, Section 13 of the South Carolina Constitution was error.

The decision of this Court in *Wesberry v. Sanders, supra,* made clear that congressional districts were to reflect substantially equal population distribution. Such equality of population is concededly the first object of reapportionment. However, *Wesberry* should not be read in isolation. Other decisions of this Court have held that state laws and policies also have an important place in determining the composition of congressional districts. *Smiley v. Holm,* 285 U. S. 355 (1932) expressly held that federal constitutional law incorporates state constitutional provisions relating to congressional reapportionment. Similarly, *White v. Weiser,* 412 U. S. 783 (1973) recognized that

> [j]ust as a federal district court, in the context of legislative reapportionment, should follow the policies and preferences of the state, as expressed in statutory and constitutional provisions or in the reapportionment plans proposed by the state legislature, whenever adherence to state policy does not detract from the requirements of the Federal Constitution, we hold that a district court should honor state policies in the context of congressional reapportionment. In fashion-

> ing a reapportionment plan or in choosing among plans, a district court should not pre-empt the legislative task nor 'intrude upon state policy any more than necessary.' *Whitcomb v. Chavis*, . . . 91 S. Ct. at 1878. 412 U. S. at 795.

Appellants recognize that state policies may not be advanced to defeat the equal population principle of *Wesberry*. Decisions since *Wesberry*, however, have held that there is considerable room for the application of state law in the context of reapportionment. *Weiser* makes clear that decisions of a state legislative body reached in furtherance of the admittedly legislative process of reapportionment, *Reynolds v. Sims*, 377 U. S. 533 (1964), "should not be unnecessarily put aside [by a court] in the course of fashioning relief appropriate to remedy what were held to be impermissible population variances between congressional districts." 412 U. S. at 796. Indeed Article I, Section 4 of the United States Constitution expressly provides that "[t]he times, places and manner of holding election for senators and representatives, shall be prescribed in each state by the legislature thereof . . . ."

The continued viability of state law in regard to congressional reapportionment was recently reaffirmed by this Court in *Upham v. Seamon*, ____ U. S. ____, 102 S. Ct. 1518 (1982). The opinion in *Upham* quotes the cited language from *Weiser* with approval, and goes on to reaffirm that "[t]he *only* limits on judicial deference to state apportionment policy . . . [are] the substantive constitutional and statutory standards to which such state plans are subject." 102 S. Ct. at 1521 [emphasis added].

Thus, both state and federal law were intended to operate concurrently in the electoral process. The primacy of the federal constitution is not challenged by Appellants. However, the one man, one vote requirement of Article I, Section 2 does not require that legitimate state interests,

expressed in the state constitution, be unnecessarily sacrificed. The protection of the right to vote may be accomplished by the concurrent application of both federal and state constitutional principles.

Fair and effective representation for all voters is the goal of reapportionment. Fair and effective representation, however, is not a function of mathematics alone. As expressed in *Reynolds v. Sims* in the context of the reapportionment of a state legislative body:

> [I]t is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness is hardly a workable constitutional requirement.

377 U. S. at 577.

The teaching of *Reynolds* is ignored in the reapportionment plan adopted by the district court in this case. It is the right to vote which is protected by Article I, Section 2 of the Constitution. When the plan adopted by the district court in this case is analyzed by voting age population, however, it does not differ significantly from other plans available to the lower court which did not cross county lines.

TABLE 1[3]

COMPARISON OF PLANS BASED ON VOTING AGE POPULATION

	Plan			
District	*0.28*	*0.73*	*0.98*	*1.48*
1	363,074	361,289	362,818	359,280
2	372,281	372,281	357,822	371,463
3	366,313	363,538	366,318	357,071
4	373,015	373,670	373,015	373,015
5	357,907	365,261	372,721	372,721
6	347,250	343,806	347,151	346,295
Total % Variance	±7.09	±8.20	±7.12	±7.35

As Table I demonstrates, when the standard of measurement is the right to have one's *vote* weighted equally, the court adopted plan is not preferable. Its adoption on the basis of its *apparent* adherence to the "one-man, one-vote" principle was an arbitrary exercise of judicial power. From the perspective of protecting the right to vote, the justification advanced for cutting county lines disappears. There is no constitutional reason to violate county lines to achieve the level of population equality created by the district court plan. At best it creates only "an illusion of better equality." *Carstens v. Lamm*, 543 F. Supp. 68 (D. Colo. 1982).

The district court in this case, however, not only pursued this illusion, but did so at the expense of a legitimate state interest in the preservation of county lines. This was unnecessary to satisfy *Wesberry*, since the court had several plans before it which both preserved county lines *and* achieved substantial population equality among the dis-

[3] The data in Table 1 are derived from Defendant's Exhibit 9, which reflects the 18 years and over population of each county in the state as of April 1, 1980.

tricts. The preference of the district court for the plan with the lowest population variance at the expense of South Carolina constitutional law was particularly unwarranted because of the inherent inaccuracy of the census data upon which such a choice necessarily rests:

> . . . [T]he basic statistical materials which legislatures and courts usually have to work with are the results of the United States census taken at 10-year intervals and published as soon as possible after the beginning of each decade. These figures may be as accurate as such immense undertaking can be, but they are inherently less than absolutely accurate. Those who know about such things recognize this fact, and, unless they are to be wholly ignored, it makes little sense to conclude from relatively minor census population variations among legislative districts that any person's vote is being substantially diluted. The "population" of a legislative district is just not that knowable to be used for such refined judgments.

Gaffney v. Cummings, 412 U. S. 735, at 745-48 (1973).

The concerns expressed in *Gaffney* are equally applicable to congressional redistricting. Because census data are inaccurate, errors become magnified when larger population segments are analyzed. The inaccuracies pointed out in *Gaffney*, when applied to a congressional district of one half million people, will produce an even larger total error. For this reason, attempts to reduce population variances in congressional districts to marginally smaller percentages does little to preserve the fair and effective representation required by *Wesberry*.

This does not mean, however, that Article I, Section 2 of the United States Constitution is without any substance or that no remedy for malapportionment can be effective. *Gaffney* struck the necessary balance between mathematics and the protection of the right to vote:

> . . . *Reynolds* recognized that "the achieving of fair and effective representation for all citizens is . . . the basic aim of legislative apportionment" . . . and it was for that reason that the decision insisted on substantial equality of populations among districts.
>
> This is a vital and worthy goal, but surely the attainment does not in any way depend upon eliminating the insignificant populations variations involved in this case. Fair and effective representation may be destroyed by gross population variances among districts, but it is apparent that such representation does not depend solely on mathematical equality among district populations. There are other relevant factors to be taken into account and other important interests that states may legitimately be mindful of . . . An unrealistic overemphasis on raw population figures, a mere nose count in the district, may submerge these other considerations and itself furnish a ready tool for ignoring factors that in day-to-day operations are important to an acceptable representation and apportionment arrangement.

412 U. S. at 748-49.

Both state and federal law must concurrently operate to protect the right to vote and to provide fair and effective representation for the people. To ignore state law to achieve "better" mathematical equality among districts is to ignore the legitimate interests of the citizens. In the present case, Appellants respectfully suggest that important state interests were sacrificed to achieve only an illusion of greater equality. If the orders of the district court are allowed to stand, the achievement of fair and effective representation will henceforth be simply a matter of mathematics.

CONCLUSION

For the reasons above stated, Appellants respectfully urge that this Court note probable jurisdiction of the cross-appeal.

Respectfully submitted,

RANDALL T. BELL,
ROBERT E. STEPP,
Post Office Box 11390,
Columbia, S. C. 29211,
(803) 799-9800
Attorneys for Appellants.

Columbia, South Carolina,
Date: October 7, 1982.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

COLUMBIA DIVISION

Civil Action No. 81-2287-6

South Carolina State Conference of Branches of the National Association for the Advancement of Colored People, Inc., and William F. Gibson, its President, Adele Thompson Adams, Carol Camellia Singletary, Rev. George R. Couser, Robert S. Logan, Madie Robinson, Frank B. Washington, David I. Lucas, and S. T. Peden, Plaintiffs,

versus

Honorable Richard W. Riley, Governor of the State of South Carolina, Nancy Stevenson, Lieutenant Governor of the State of South Carolina, Presiding Officer and President of the Senate, L. Marion Gressette, President *Pro Tempore* of the Senate and Chairman of the Senate Judiciary Committee, Raymond Schwartz, Jr., Speaker of the House, Robert J. Sheheen, Chairman of the House Judiciary Committee of the State of South Carolina, and James Ellisor, Elections Commissioner for the State of South Carolina, Defendants.

Civil Action No. 81-2493-0

Richard Patrick Owens, a resident of the County of Hampton and Henry D. Prickett, a resident of the County of Greenville, Plaintiffs,

versus

Richard W. Riley, Governor of the State of South Carolina, Nancy Stevenson, Lieutenant Governor of the State of South Carolina and Presiding Officer of the Senate, Ramon Schwartz, Jr., Speaker of the South Carolina House of Representatives, and James B. Ellisor, Executive Director of the Elections Commission for the State of South Carolina, Defendants.

(Argued February 11, 1982 Decided)

Before HAYNSWORTH, Senior Circuit Judge, RUSSELL, Circuit Judge, and SIMONS, Chief Judge for the District of South Carolina

PER CURIAM:

For many months the two houses of the South Carolina legislature wrestled with the problem of congressional redistricting on the basis of the 1980 census data. Plans acceptable to one of the houses, however, were not acceptable to the other. Conceiving themselves to be hopelessly deadlocked, they abandoned the attempt to reach agreement with the expectation that this court would adopt a redistricting plan for the State.

I.

No one contends the 1970 congressional districting plan may be continued. Between the 1970 and 1980 censuses, there were population shifts and disparate growth rates so that the 1970 plan would have impermissibly high variances on the basis of the 1980 census data. All parties before the court are thus agreed that this court must adopt a new congressional redistricting plan for South Carolina. That we will do, but with the distinct qualification that, if a different congressional districting plan is lawfully enacted, it may be placed in effect in lieu of the court's plan, provided it meets federal constitutional requirements and is in place in time to permit orderly functioning of the electoral process in the first election to which it is to be applied.

II.

Two separate cases have been consolidated for hearing and disposition. One of them was brought by the South Carolina State Conference of Branches of the National Association for the Advancement of Colored People and some of its officials. It was brought against the Governor, the Lieutenant Governor, the chairman of the Senate Judiciary Committee and the President *Pro Tempore* of

the Senate, the Speaker of the House of Representatives, the Chairman of the Judiciary Committee of the House, and the Executive Director of the Elections Commission of the State of South Carolina. The other was brought by Richard Patrick Owens and Henry D. Prickett, in their capacities as individual voters, against some of the same defendants.[1]

The parties have presented a number of plans for consideration by the court. The NAACP plaintiffs have submitted three plans, though they principally urge adoption of one of two plans which would create a Sixth District with a majority of black residents. The Owens plaintiffs have submitted the "Eagle Plan," so called because its Second District resembles an eagle with wings widespread and its tail, neck and head outstretched. They also have submitted a modified Eagle Plan, with a very low variance achieved by crossing county lines to pick up or drop pockets of people. The defendants from the House of Representatives have submitted a plan enacted by the House, and they urge its adoption by the court. The Senate defendants have laid upon the table a number of plans, only one of which, the 3.44% plan which is discussed later, was ever enacted by either house. They do not urge us to adopt any one of them, but invite our attention to them solely for the purpose of showing that district boundaries may be drawn to produce tolerable variances without violating county lines.

III.

We take our direction from a set of principles which should guide us.

A. First, and most important, is the requirement of *Wesberry v. Sanders*, 376 U. S. 1 (1964), that "as nearly as is practicable one man's vote in a congressional election

[1] A number of defendants have filed motions to dismiss. We do not consider those motions of the legislative defendants, for no relief will be granted as to them. The motion of the Executive Director of the Elections Commission is denied, for it is he who will have primary responsibility for the implementation and execution of our order. Our order will also run against the Governor and Lieutenant Governor insofar as they may be involved in the execution of the election laws, including compliance with our direction.

is to be worth as much as another's." *Id.* at 7-8. We will thus confine our consideration to plans with low population variances. There are several plans before us with maximum variances of less than 1%, still more with maximum variances of less than 2%. The higher the variance, of course, the stronger must be the reasons for departure from near perfect equality.

B. The State has a substantial interest in the preservation of county lines in the congressional redistricting process, as long as that can be done without violation of the principle of *Wesberry v. Sanders* and consistently with other State interests. *See White v. Weiser,* 412 U. S. 783, 795 (1973). Indeed, the Senate defendants insist that the South Carolina Constitution requires of the legislature strict adherence to county lines in drawing congressional districts.

Article VII, § 13 of the South Carolina Constitution of 1895 provides:

> The General Assembly may at any time arrange the various Counties into Judicial Circuits, and into Congressional Districts . . . as it may deem wise and proper . . . .

The provision is permissive, not mandatory, though the Senate defendants would find in it an implicit prohibition against subdivision of any county. With respect to that, one may say that there should be little doubt that the members of the constitutional convention of 1895 did not foresee the Supreme Court's holding in *Wesberry v. Sanders* and the problems that would be engendered by required decennial redistricting. Probably no one thought of the possibility of a division of a county between two congressional districts, and, if one had thought of it, the answer probably would have been that it should not be done unless there was good reason for it.

This is a question, however, which we may not address authoritatively. Only the Supreme Court of South Carolina may do that. Clearly, however, South Carolina's constitutional provision addresses the powers of the legisla-

ture. It has nothing to do with the power of this court, and it is relevant to our decision only insofar as it may be read as an expression of a general state policy against dividing counties in the course of congressional redistricting.

We recognize, however, that there is a substantial state policy favoring drawing congressional districts along county boundaries. This is so because the residents of a county have a community of interest. They are accustomed to voting together for county officials. There is much administrative convenience in drawing district lines along county lines, and it facilitates the process of organizing constituencies and campaigning for the support of constituents.

C. Any new plan should alter the old only insofar as necessary to obtain an acceptable result. Incumbents know their constituents in the old districts, and many of those constituents will know their congressman as "my congressman." Many of the constituents would have been served by the congressman in ways calculated to obtain and enhance loyal support. Such voters ought not to be deprived of the opportunity to vote for a candidate that has served them well in the past and to enjoy his continued representation of them. Supporters and opponents, alike, have a basis for judging him. This consideration, of course, must give way to the requirement of *Wesberry v. Sanders*, but great alterations of the old districts should not be undertaken if lesser change will achieve the desired result. *See White v. Weiser, supra*, at 797.

D. Certain adjoining counties have a special community of interest, for metropolitan areas overflow county boundaries. This is true of Greenville and Spartanburg and of Richland and Lexington, for metropolitan Columbia's growth in Lexington County has been large and vigorous. It is also true of Charleston, Berkeley and Dorchester. Metropolitan Charleston's area includes portions of both Berkeley and Dorchester, and the three counties together support and run a joint Chamber of Commerce. *See David v. Cahill*, 342 F. Supp. 463, 469 (D. N. J. 1972).

E. The districts should be as compact as reasonably possible. *See Dunnell v. Austin*, 344 F. Supp. 210, 215 (E. D. Mich. 1972).

F. We must be careful that district boundaries are not gerrymandered to dilute the voting strength of minorities. *See Gomillion v. Lightfoot*, 364 U. S. 339 (1960). A court should approach the problem with racial neutrality but with care to be assured that no unfairness to any race is inadvertently perpetrated.

G. Finally, we must give some weight to the fact that the plan adopted by the House has substantial political support. No other plan with an acceptable variance has been adopted by either house or enjoys any ascertainable degree of political acceptance.

Perhaps no plan may fully serve all of these purposes, but each should be judged with these considerations in mind.

IV.

The House plan achieves a thoroughly acceptable maximum of 0.28%

The changes to achieve that result involve only six of the forty-six counties. Barnwell and Allendale are moved from the Second District to the Third. Newberry County is moved from the Third District to the Fifth, while Union County is moved from the Fifth to the Fourth, and Lee County is moved from the Sixth to the Fifth.

Berkeley County is divided. Most of the populous Goose Creek-Hanahan Division of Berkeley County, a part of metropolitan Charleston in which approximately 54,000 people reside, is placed with Charleston in the First District, while the much larger, though more rural area of the county, containing about 40,000 people, is placed in the Sixth District.

The House plan substantially preserves intact the metropolitan centers which are thought to be best left together, Greenville and Spartanburg remain in the Fourth, Richland and Lexington remain in the second, while Charleston and Dorchester, and most of that portion of Berkeley

County which may be regarded as part of the Charleston metropolitan area, remain in the First.

The House plan does not reduce the black population of any district by as much as 1%. That population is reduced by .9% in the First District, by .8% in the Second, and by .4% in the Sixth, but there are reciprocal increases of 1% in the Third District, of .7% in the Fourth, and of .2% in the Fifth.

The only discernible objection to the House plan is the division of Berkeley County.

One of the plans submitted on behalf of the Senate defendants, though its adoption is not urged, has a maximum variance of .73%, substantially higher than the .28% of the House plan. The districts are organized entirely along county lines, but to achieve that result eighteen counties are moved from one district to another. Greenville and Spartanburg are divided, and Berkeley County is entirely separated from Charleston and placed in the Sixth District, although it is substantially surrounded by a revised First District.

Another plan submitted by counsel for the Senate defendants would achieve a maximum variance of .98%. The division is entirely along county lines, but Richland and Lexington are separated, as are Charleston and Dorchester. The Second District, into which the Fifth deeply penetrates, could hardly be called compact. Thirteen counties would be transferred out of their present districts.

Counsel for the Senate defendants have submitted other plans with maximum variances ranging from 1.48% to 2.37%. The boundaries are entirely along county lines, but they achieve their results by radical rearrangement of the counties. In the 1.48% plan, for instance, the First District gives up Hampton, Jasper, Beaufort, Colleton and Dorchester but picks up Georgetown and Horry Counties. The Second District would lose Barnwell, Allendale, Bamberg, Orangeburg, Richland and Calhoun Counties, but would acquire Saluda, Newberry, Laurens, Abbeville, Anderson Oconee and Pickens Counties. The Third District would lose

Oconee, Pickens, Anderson, Abbeville, Saluda and Newberry Counties, but would pick up Barnwell, Allendale, Bamberg, Orangeburg, Calhoun, Hampton, Colleton, Jasper, Dorchester and Beaufort Counties. The Fifth District would lose Union County to the Fourth, and Chesterfield, Kershaw and Sumter to the Sixth, while picking up Richland County. The Sixth District would lose Horry and Georgetown to the First, while picking up Sumter, Kershaw and Chesterfield.

As we have indicated, neither the Senate itself nor either of the Senate defendants has endorsed any of the plans submitted to us by their lawyers. They are simply illustrations of the fact that the district lines can be drawn with strict adherence to county lines, but they are also demonstrations of the fact that the cost is very large, since they bear little resemblance to the present districts. In addition, the population variances in all of the plans exceed the population variance in the House plan.

The last plan actually considered favorably by the Senate has a maximum variance of 3.44%, and it has a Third District extending from the mountain ridges, along which the border with North Carolina runs, to the Atlantic Ocean.

The Eagle Plan has a maximum variance of 1.55%, and separates Richland and Lexington Counties and Charleston and Dorchester Counties. Moreover, it would transfer ten counties from one district to another. The residencies of two incumbents would be placed in the same district.

At oral argument, counsel for the Owens plaintiffs submitted a modified Eagle Plan. It is identical to the first except that in four instances it crosses county lines to pick up small groups of persons and move them from one district to another. By such moves it achieves a maximum variance of only 0.0656%, but the separation of Richland and Lexington Counties and Charleston and Dorchester Counties remain. Moreover, crossing county lines in four instances for the purpose of transferring relatively small groups of people from one district to another seems unacceptable.

The NAACP plaintiffs have tendered three plans with maximum variances of 0.66%, 1.50% and 2.61%. The re-

arrangement of the counties is radical, many counties are split, and the population variances are higher than the one in the House plan. In the 0.66% plan, Colleton, Dorchester, Berkeley, Williamsburg, Marion, Darlington, Richland, Anderson, Florence, Orangeburg and York are each divided between two districts. The 1.50% plan divides Anderson, York, Richland, Darlington, Florence, Berkeley, Dorchester and Colleton Counties.

V.

From these brief descriptions of suggested plans, it should be apparent that the most acceptable one is the House 0.28% plan. It more satisfactorily meets every consideration identified as relevant to our decision, except for the division of Berkeley County. A division of one county is not an inconsiderable objection, but it seems to us far less weighty than the extensive and radical rearrangement of the counties or the great increase in the maximum variances that strict adherence to the boundaries of all forty-six counties requires. Moreover, that division is not simply a move to pick up or exclude people, but is drawn roughly along the borders of metropolitan Charleston with which the people in the lower part of Berkeley County do have a community of interest.

We are not entirely satisfied, however, with the precise location of the line dividing Berkeley County. In part it runs through a Naval facility upon which people are housed, and the exact line through it is yet to be located upon the basis of a population count yet to be made. To the extent that it is feasible, the line there and elsewhere should run along precinct lines so that all of the residents of each precinct may use one ballot for congressional races. Counsel will be requested to make further inquiry as to that, and to report back to the Court.

We have considered all of the suggested plans. We have not attempted to develop one of our own. The likelihood that we could produce one better than the House 0.28% plan is so slight an attempt is unwarranted. The time for campaigning is almost at hand; an effort to develop

a court alternative would take weeks if not months. As soon as possible candidates should know the boundaries of their districts, and the voters their choice of candidates.

VI.

An order will be entered requiring the House 0.28% plan to be placed in effect, subject to modification of the line dividing Berkeley County. That plan will remain in effect for all congressional elections through 1990, unless South Carolina enacts its own plan which will meet federal constitutional requirements. To that end, the South Carolina legislature is free to proceed at any time, and to place in effect a lawfully enacted plan, provided only that the plan is in place a sufficient time before the first election to which it is to be applied to permit the orderly functioning of the electoral process.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

COLUMBIA DIVISION

Civil Action No. 81-2287-6

South Carolina State Conference of Branches of the National Association for the Advancement of Colored People, Inc., and William F. Gibson, its President, Adele Thompson Adams, Carol Camellia Singletary, Rev. George R. Couser, Robert S. Logan, Madie Robinson, Frank B. Washington, David I. Lucas, and S. T. Peden, Plaintiffs,

versus

Honorable Richard W. Riley, Governor of the State of South Carolina, Nancy Stevenson, Lieutenant Governor of the State of South Carolina, Presiding Officer and President of the Senate, L. Marion Gressette, President *Pro Tempore* of the Senate and Chairman of the Senate Judiciary Committee, Raymond Schwartz, Jr., Speaker of the House, Robert J. Sheheen, Chair-

man of the House Judiciary Committee of the State of South Carolina, and James Ellisor, Elections Commissioner for the State of South Carolina, Defendants.

Civil Action No. 81-2493-0

Richard Patrick Owens, a resident of the County of Hampton and Henry D. Prickett, a resident of the County of Greenville, Plaintiffs,

versus

Richard W. Riley, Governor of the State of South Carolina, Nancy Stevenson, Lieutenant Governor of the State of South Carolina and Presiding Officer of the Senate, Ramon Schwartz, Jr., Speaker of the South Carolina House of Representatives, and James B. Ellisor, Executive Director of the Elections Commission for the State of South Carolina, Defendants.

ORDER

In our opinion filed March 8, 1982, we directed the parties and counsel to redraw the line dividing Berkeley County so as to make it run along precinct lines. Counsel for the defendants, other than the Senate defendants, have submitted a plan which draws a new line without dividing precincts. It affects the numbers slightly, for it places 432 more people in the First District than the previously drawn line, and, of course, 432 fewer people in the Sixth District. This transfer increases the total variance slightly from 0.28 to 0.295. However, it is easily administered and every voter in each precinct may vote in the same congressional election.

The new line places Berkeley County voting precincts 7, 11, 26, 28, 29 and 30 in the First District, while all the remaining Berkeley County precincts are placed in the Sixth District.

Maps showing the detail of the new Berkeley County division have been filed with the Clerk.

At a hearing held in Columbia, South Carolina on April 28, 1982, at which all counsel were present, there was no objection to the new line dividing Berkeley County.

The Court approves the new line.

With that modification of the earlier decision, IT IS NOW ORDERED that the Court adopted 0.295 plan be placed into effect for the congressional elections to be held in 1982 and in all ensuing congressional elections through the year 1990, unless South Carolina shall adopt a different congressional districting plan meeting the requirements of the Constitution of the United States. In the event of the adoption of a different legislative districting plan, it may be placed into effect at such time as may be specified in the statute.

CLEMENT F. HAYNESWORTH, JR.
Senior United States Circuit Judge.
DONALD RUSSELL,
United States Circuit Judge,
CHARLES E. SIMONS, JR.,
Chief Judge, United States District Court.

April 30, 1982

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

COLUMBIA DIVISION

South Carolina State Conference of Branches of The National Association for the Advancement of Colored People, Inc., and its President, William F. Gibson, et al., Plaintffs,

versus

Richard W. Riley, Governor of the State of South Carolina, et al., Defendants.

ORDER

Civil Action No. 81-2287-6

We have before us an application by the plaintiffs for a preliminary and permanent injunction against the implementation by the defendants of our Order of May 7, 1982, directing the implementation of a new congressional redistricting plan. The motion is based upon the contention that Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973(c), is applicable and prevents implementa-

tion of the court-ordered plan without preclearance in accordance with Section 5. The papers were filed on May 31, 1982, close to the eve of the primary election scheduled to be held on June 8, 1982.

A legislatively-adopted congressional redistricting plan is subject to the preclearance requirements of Section 5, and a federal district court is without jurisdiction to order its implementation without such preclearance. *McDaniel v. Sanchez*, 452 U. S. 130 (1981). On the other hand, a court-directed plan, which has not been adopted by the legislature, is not subject to the preclearance requirements of Section 5. *Connor v. Johnson*, 402 U. S. 690 (1971). The plan imposed by the court was never adopted by the South Carolina Legislature.

Over a period of many months South Carolina's Legislature considered many plans for congressional redistricting based upon 1980 census data. There developed what appeared to be irreconcilable differences between the Senate and the House of Representatives with the result that legislative efforts to enact a redistricting plan acceptable to both Houses were terminated.

With a minor modification, the plan imposed by this court was based upon a plan that had been approved by the House of Representatives. It had never been approved by the Senate. Indeed, in this court, counsel for senatorial defendants strongly objected to the court's adoption of that plan primarily upon the ground of its division of Berkeley County.

That plan was only one of many considered by the court. It was adopted by this court only because it appeared to be the most reasonable and most acceptable alternative open to the court. The reasons for our preference of that plan were stated in our earlier opinion.

Since the plan imposed by the court is not a legislatively enacted plan, it is not subject to the preclearance requirements of Section 5. Under our order the legislature is free to replace the court-ordered redistricting plan with a legislatively devised congressional redistricting plan, subject only to the requirements of Section 5.

Since Section 5 of the Voting Rights Act is inapplicable, the request for an injunction against implementation of the court-ordered plan is denied.

With the concurrence of Judge Russell and Judge Simons.

/s/ CLEMENT F. HAYNESWORTH, JR.,
United States Senior Circuit Judge.

June 2, 1982
Deputy Clerk

APPENDIX D

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C. 20543

June 8, 1982

Margarett Ford, Esq.
NAACP
1790 Broadway
New York, New York 10019

RE: South Carolina State Conference of Branches of NAACP, *et al.* v. Richard W. Riley, Governor of South Carolina, *et al.*
A-1059

Dear Mrs. Ford:

Your application for a stay and/or injunction in the above-entitled case has been presented to the Chief Justice, who has endorsed thereon the following:

"Denied
WEB
6/7/82
6:15pm"

Very truly yours,
ALEXANDER L. STEVAS,
Clerk
By
Robert W. Kuhn
Assistant Clerk

cc: James M. Holly, Esq.
Preston B. Haines, III, Esq.
Randall T. Bell, Esq.

Office - Supreme Court, U.S.
FILED
NOV 1 1982
ALEXANDER L. STEVAS
CLERK

No. 82-574

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

NANCY L. STEVENSON and L. MARION GRESSETTE,
Appellants,

versus

SOUTH CAROLINA STATE CONFERENCE OF BRANCHES OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, INC., et al., and RICHARD W. RILEY, Governor of the STATE OF SOUTH CAROLINA, et al., Appellees.

ON APPEAL FROM THE THREE-JUDGE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

MOTION TO AFFIRM OR DISMISS

DANIEL R. McLEOD
Attorney General

C. TOLBERT GOOLSBY, JR.*
Deputy Attorney General

TREVA G. ASHWORTH
Senior Assistant
Attorney General

JAMES M. HOLLY
Assistant Attorney General

Post Office Box 11549
Columbia, S.C. 29211
(803) 758-8667

ATTORNEYS FOR APPELLEES
RICHARD W. RILEY, RAMON
SCHWARTZ, JR., AND
JAMES B. ELLISOR

ISABEL W. SMITH
Attorney at Law

Post Office Box 11867
Columbia, S.C. 29211
(803) 758-7268

ATTORNEY FOR APPELLEE
ROBERT J. SHEHEEN

*Counsel of Record

No. 82-574

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C. TOLBERT GOOLSBY, JR.*
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Senior Assistant
Attorney General

JAMES M. HOLLY
Assistant Attorney General

Post Office Box 11549
Columbia, S.C. 29211
(803) 758-8667

ATTORNEYS FOR APPELLEES
RICHARD W. RILEY, RAMON
SCHWARTZ, JR., AND
JAMES B. ELLISOR

ISABEL W. SMITH
Attorney at Law

Post Office Box 11867
Columbia, S.C. 29211
(803) 758-7268

ATTORNEY FOR APPELLEE
ROBERT J. SHEHEEN

*Counsel of Record

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

NANCY L. STEVENSON and L. MARION GRESSETTE, Appellants,

versus

SOUTH CAROLINA STATE CONFERENCE OF BRANCHES OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, INC., et al., and RICHARD W. RILEY, Governor of the STATE OF SOUTH CAROLINA, et al., Appellees.

MOTION TO AFFIRM OR DISMISS

Pursuant to Rule 16.1(c) and (d) of the Rules of the Supreme Court of the United States, the appellees Richard W. Riley, Ramon Schwartz, Jr., Robert J. Sheheen, and James B. Ellisor move the Court to affirm the judgment of the three-judge United States District Court for the District of South Carolina, or, in the alternative, to dismiss the appeal on the grounds that it is manifest that the question on which the decision of the cause depends is so unsubstantial as not to need further argument.

QUESTION PRESENTED ON APPEAL

Whether a three-judge court properly followed the standards for congressional apportionment when it fashioned a plan based on population equality that crossed one county line in a state that has a constitutional provision expressing a preference for maintaining county lines?

OPINIONS BELOW

The orders of the three-judge United States District Court for the District of South Carolina are set forth in appellants' jurisdictional statement. See, Jurisdictional Statement, App. A, B, and C.

JURISDICTION

The jurisdiction requisites are adequately set forth in the appellants' jurisdictional statement. See, Jurisdictional Statement at 2-3.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The provisions of Article I, Section 2 and Section 2 of the Fourteenth Amendment of the United States Constitution and the provisions of Article VII, Section 9 and Article VII, Section 13 of the South Carolina Constitution of 1895 are set forth in appellants' jurisdictional statement. See, Jurisdictional Statement, App. 3-5.

STATEMENT OF CASE

Following the release of the 1980 census data, the South Carolina Senate and House unsuccessfully attempted to enact a new congressional redistricting plan. Several plans were passed by each House; however, no plan was enacted by both Houses of the General Assembly. The last plan passed by the House was a plan referred to as the 0.28 plan. This plan provided for low population variance and split one

portion of one county, Berkeley County.

After the passage of the 0.28 plan, the General Assembly was unable to agree on a plan and a three-judge court was convened pursuant to suits previously filed by the plaintiffs and others. Several proposed redistricting plans were submitted to the court, including the 0.28 plan.

On March 8, 1982, the district court issued an Order adopting the 0.28 plan as a court-ordered congressional redistricting plan. The 0.28 plan, however, was subsequently discarded in favor of a court-fashioned redistricting plan, the so-called 0.295 plan, which resulted from a redrawing on April 30, 1982, of the line that divided Berkeley County into both the First and Sixth Congressional Districts.

The court's original Order of March 8, 1982, discussed the issue of maintaining county lines and concluded that the 0.28

plan, on which the 0.295 plan was subsequently based, met the requirement of low population variance. It did so, the court observed, without radically rearranging the counties and by placing the people of only one small portion of a county into another district with others with whom they shared a community of interest. Jurisdictional Statement, App. at 27.

REASONS FOR GRANTING MOTION

The United States Supreme Court in Wesberry v. Sanders, 376 U.S. 1 (1964), held that Article I, Section 2 of the Constitution of the United States mandates equal representation for equal numbers of people. Consequently, in the enactment of a congressional districting plan,

> the State [must] make a good faith effort to achieve precise mathematical equality.... Unless population variances among congressional districts are shown to have resulted de-

> spite such effort, the State must justify each variance, no matter how small.... [The Constitution] permits only the limited population variances which are unavoidable despite a good faith effort to achieve absolute equality, or for which justification is shown.

Kirkpatrick v. Priesler, 294 U.S. 526 at 530-531 (1969); see also, White v. Weiser, 412 U.S. 793 at 790-791 (1973).

The court in fashioning a redistricting plan is required to follow as much as possible the preferences and policies of the state because districting is primarily a legislative function. See, White v. Weiser, supra, at 795; see also, Shayer v. Kirkpatrick, 541 F. Supp. 922 at 932 (W.D. Mo. 1982); Doulin v. White, 528 F. Supp. 1323 at 1331 (E.D. Ark. 1982). The state's work on redistricting, legislative proposals and historical practices may all be reviewed in determining the state's policy. Shayer v. Kirkpatrick, supra,

at 932.

One policy consideration of the State of South Carolina was to observe, as much as feasible, county lines in the construction of congressional districts. Neither the House nor the Senate adopted any plan that either completely or in large measure did not follow county lines.

However, Article VII, Section 13 of the South Carolina Constitution of 1895 does not mandate that county boundaries can not be crossed by the General Assembly in establishing congressional districts. This provision provides that the General Assembly "may" arrange the counties into congressional districts. The use of the term "may" in South Carolina constitutional and statutory provisions has been held to be merely advisory or discretionary. State v. Wilson, 274 S.C. 352, 264 S.C. 2d 414, 416 (1980: Carolina Music Co. v. Query,

192 S.C. 308, 6 S.E. 2d 473, 498 (1939); State v. Reeves, 112 S.C. 383, 99 S.E. 841, 842 (1919). The term should be given the same meaning and interpretation in Article VII, Section 13. This construction is further supported by comparing Article VII, Section 13 with the use of the term "shall" in other provisions of the South Carolina Constitution; specifically Article III, Section 3 which establishes that there "shall" be one hundred and twenty-four State House members and with Article VII, Section 14 which provides that a county line "shall" not pass through incorporated cities and towns.

The courts have consistently held that the primary factor in congressional redistricting is population equality and other policy considerations and factors may be considered only if they do not appreciably affect population equality. White

v. Weiser, supra, at 795. This court has repeatedly held that it does

> ...not find legally acceptable the argument that variances are justified if they necessarily result from a State's attempt to avoid fragmenting political subdivisions by drawing congressional district lines along existing county, municipal, or other political subdivision boundaries. Kirkpatrick v. Preisler, supra, at 533-534.

See also, Wells v. Rockefeller, 394 U.S. 542 (1969); White v. Weiser, supra, at 791.

The three-judge court in this case in fashioning its 0.295 plan established a plan with low population variance that followed as much as possible the state's preference for maintaining county lines. In the court's plan only one county is split. The county boundaries of the remaining forty-five counties are maintained without sacrificing population equality.

This court, therefore, is not presented with a novel question by the cross-appeal of

the case. The court did incorporate applicable state policy considerations and fashioned a plan that divided only one small portion of one county while still maintaining population equality.[1] No case has held in congressional redistricting that county lines must be preserved to the detriment of population equality. The cases cited by the cross-appellant as being in direct conflict with the district court's decision are not in opposition to that decision.

In Wisconsin State AFL-CIO v. Elections Board, 543 F. Supp. 630 (E.D. Wis. 1982), a

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[1]The court not only utilized the policy considerations of preserving county lines but applied additional policy considerations not at issue in this cross-appeal, i.e., there is no retrogression in black voting strength, incumbents are not pitted against each other, the districts are continguous and compact, and community of interest is maintained.

suit was brought concerning state legislative reapportionment. The court found that even though Wisconsin had a state constitutional provision providing that the districts should be bounded by "county, precinct, town or ward lines" the maintaining of the integrity of the county lines was of secondary importance to the requirements of population equality. Wisconsin, supra, at 634-635.

Boyer v. Gardner, 540 F. Supp. 624 (D.N.H. 1982) is another state legislative reapportionment case. The court found that maintaining county, city and town boundaries to be a legitimate policy reason for finding that a state reapportionment plan of 13.74 percent variation was valid.

State legislative reapportionment plans, of course, do not have to meet the more stringent requirements of congressional districting. Chapman v. Meier, 420

U.S. 1, 23 (1975); Gaffney v. Cummings, 412 U.S. 735, 741-742 (1973); Wisconsin, supra, at 633.

The cases of Jordan v. Winter, 541 F. Supp. 1135 (N.D. Miss. 1982) and O'Sullivan v. Brier, 540 F. Supp. 1200 (D. Kan. 1982) are both congressional redistricting cases. In Jordan the court listed the primary state policy considerations and attempted to incorporate these considerations into a plan. Jordan, supra, at 1143-1144. Preserving county lines was not listed as one of the policy considerations. Moreover, the plan which the court approved split two counties. The court in O'Sullivan set out not to approve a plan splitting county lines; however, the court stated at the outset that such a plan would be possible only "if the resulting district realignment would not result in unconstitutional population deviations." (Emphasis added). O'Sullivan,

supra, at 1204.

These cases are cited by cross-appellants for the proposition that these courts did consider and utilize state policy considerations in providing redistricting plans. However, the three-judge court in the present case also utilized state policy considerations in fashioning its plan and adhered as nearly as possible to those policies without violating federal constitution provisions.

The three-judge court specifically listed state policy considerations as factors in deciding on an acceptable plan. The court placed special emphasis on maintaining county lines. Jurisdictional Statement, App. A at 22-25. The court cited the South Carolina constitutional provisions at issue here and stated that:

> [t]he provision is permissive, not mandatory, though the Senate defendants would find in it an

> implicit prohibition against subdivision of any county. With respect to that, one may say that there should be little doubt the members of the constitutional convention of 1895 did not forsee the Supreme Court's holding in Wesberry v. Sanders and the problems that would be engendered by required decennial redistricting. Probably no one had thought of the possibility of a division of a county between two congressional districts, and, if one had thought of it, the answer probably would have been that it should not be done unless there was good reason for it. Jurisdictional Statement, App. A, at 22.

The court then considered and rejected the 0.73 and 0.98 plans because although they kept all county lines intact they had substantially higher population variances than the 0.28 plan, moved a substantial amount of counties from the previous congressional districts and split counties with community of interest. The court further found the 0.98 plan was not even compact. Jurisdictional Statement, App. A, at 25.

Far from not considering state policies and preferences, the court tried to balance these interests with the overriding consideration of population equality. The court repeatedly expressed concern about the state preference for maintaining county lines.[2] However, finding the other submitted plans unacceptable, the court concluded that the 0.28 plan, later fashioned by the court into a 0.295 plan, did the best to accommodate both state and federal considerations. The court did not violate the State constitutional provision of Article VII, Section 13 in adopting its 0.295 plan in that the South Carolina Constitution does not mandate that county units must be utilized. In fact, in crossing the one county line it did cross, the court followed

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[2]The court expressly rejected a Plaintiff proposed 0.0656 plan because it separated large areas of community of interest and cut across four county lines. Jurisdictional Statement, App. A at 26.

established precedent of the South Carolina Legislature in that the 1974 South Carolina State House reapportionment plan itself does not utilize county lines but instead cuts across several county lines to establish House districts.[3] And, of course, the House passed congressional districting plan of 0.28 crossed one county line. Likewise, Article VII, Section 9 was not applied to the State House reapportionment plan by the General Assembly.

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[3]Further evidence of a willingness to divide counties is indicated by the actions of the South Carolina Senate during the 1973 apportionment of the South Carolina House. In the initial stages of the 1973 special session, the House gave final reading to and sent to the Senate Bill H. 2287, a multi-member district plan which preserved county lines. See, S.C. House Journal No. 9 at 315 (September 27, 1973). The Senate thereafter amended the House passed plan by adopting a single-member district plan. S.C. Senate Journal No. 19 at 178 (October 11, 1973). Twenty-one (21) of the one hundred twenty-four (124) House districts crossed county lines. See, e.g., Exhibit A, Sub-District 5A, S.C. Senate Journal No. 19 at 140 (October 11, 1973).

Appellants assert that if the plans are analyzed by voting age population the district court's plan does not differ significantly from other plans which do not cross county lines.

In Wesberry v. Sanders, supra, the Supreme Court concluded:

> The history of the Constitution, particularly that relating to the adoption of Article 1, § 2, reveals that those who framed the Constitution meant that, no matter what the mechanics of an election,...it was population which was to be the basis of the House of Representatives. Wesberry at 375-376.

Accordingly, the court in that case and in Kirkpatrick v. Preisler, supra, and White v. Weiser, supra, evaluated the various redistricting plans using the total population of the districts, not voting age population. See also Gaffney v. Cummings,

supra, at 746-754.[4]

Cross-appellants further cite the Gaffney, supra, case as the proper balance between mathematical equality between districts and other legitimate considerations. Appellants argument disregards the fact that Gaffney concerns a state legislature apportionment plan. As previously noted there is a substantial difference in the requirements and case law in congressional districting as opposed to state legislature apportionment. Motion, supra at 11-12. Precise mathematical equality is required under the provisions of Article 1, § 2 of the United States Constitution for

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[4]Equality by voting age population would be a very elusive principle on which to base redistricting in that there is no way to equally divide a state by voting age population as obviously one district may have a larger percent of registered voters than another. Additionally, South Carolina has a population of 3,119,208 of which only 2,179,840 are registered voters.

congressional redistricting; however, it is not required for state legislature reapportionment as this process is governed by the Equal Protection Clause of the Fourteenth Amendment. Shayer v. Kirkpatrick, supra, at 928, footnote 3; Wesberry, supra, at 7-8; White v. Regester, 412 U.S. 755, 763 (1973).

> It is plain from Mahan v. Howell, [cite omitted] and Gaffney v. Cummings [cite omitted] that state reapportionment statutes are not subject to the same strict standards applicable to reapportionment of congressional seats. Kirkpatrick v. Preisler did not dilute the tolerances contemplated by Reynolds v. Sims with respect to state districting and we did not hold in Swann v. Adams [cite omitted] or Kilgarlin v. Hill [cite omitted] or later in Mahan v. Howell,...that any deviations from absolute equality, however, small, must be justified to the satisfaction of the judiciary to avoid invalidation under the Equal Protection Clause. For the reasons set out in Gaffney v. Cummings, we do not consider relatively minor population deviations among state legislature districts to substantially dilute the weight of individual voters

> in the larger districts so as to deprive individuals in these districts of fair and effective representation. White, supra, at 763-764.

Finally, the court expressly authorized the General Assembly to enact, at any time, its own constitutional plan. Jurisdictional Statement, App. A, at 28 and 30. Therefore, the General Assembly is still free to devise and enact a plan that meets all federal and state requirements and policies including maintaining county lines.

CONCLUSION

The aforementioned appellees respectfully submit that the questions upon which the decision of the cause depends are so unsubstantial as not to need further argument and, therefore, respectfully move this Court to affirm the judgment entered in the cause by the three-judge District Court for the District of South Carolina or, in the alternative, to dismiss the appeal. In any event, no injunction should issue enjoining the upcoming congressional elections.

Respectfully submitted,

DANIEL R. McLEOD
Attorney General

C. TOLBERT GOOLSBY, JR.*
Deputy Attorney General

TREVA G. ASHWORTH
Senior Assistant
Attorney General

*Counsel of Record

JAMES M. HOLLY
Assistant Attorney General

Post Office Box 11549
Columbia, S.C. 29211

ATTORNEYS FOR APPELLEES
RICHARD W. RILEY, RAMON
SCHWARTZ, JR. AND
JAMES B. ELLISOR

ISABEL W. SMITH
Attorney at Law

Post Office Box 11867
Columbia, S.C. 29211

ATTORNEY FOR APPELLEE
ROBERT J. SHEHEEN

The Senate resumed consideration of the Bill.

The question being the second reading of the Bill.

Messrs. J. VERNE SMITH, TAYLOR, THOMAS E. SMITH, JR., McMILLAN, HARTNETT and GARRETT proposed the following amendment:

Amend the Bill, as and if amended, by striking all after the enacting words and inserting in lieu the following:

"Section 1. Section 30-1 of the 1962 Code is amended to read as follows:

'Section 30-1. Effective with the general election of 1974, the State of South Carolina is divided into one hundred twenty-four election districts for the election of members to the House of Representatives with one member to be elected from each district as hereinafter described:

District Number and Composition		*Number of Representatives*	*Population of District*	*Variation per Representative*
1	Oconee County	2	40,728	—2.52
Subdistrict 1A	Oconee County Oakway Division, Seneca N. Division, Seneca S. Division, Seneca Division, Part Walhalla S. Division (E.D.'s 16, 17)	(1)	(20,838)	(—0.25)
Subdistrict 1B	Oconee County Part Walhalla S. Division (E.D. 15), Long Creek Division, Mountain Rest Division, Salem Division, Walhalla Division, Walhalla North Division, Westminster Division	(1)	(19,890)	(—4.73)

EXHIBIT A

District Number and Composition		*Number of Representatives*	*Population of District*	*Variation per Representative*
Subdistrict 5A	McCormick County Greenwood County Troy Division, Kirksey Division, Greenwood W. Division, Greenwood E. Division, Part Ninety-Six Division (E.D. 49), Part Hodges Division (E.D. 7)	(1)	(21,699)	(+3.87)
Subdistrict 5B	Greenwood County Part Greenwood N. Division (E.D. 9), Part Greenwood Division (less Part Tract 9501.04, Blocks 101-127, 201-221)	(1)	(21,189)	(+1.43)
Subdistrict 5C	Greenwood County Part Ninety-six Division (less E.D. 49), Part Hodges Division (less E. D. 7), Greenwood N. Division, (less E.D. 9), Laurens County, Princeton Division, Cross Hill Division, Part Greenwood Division (Part Tract 9501.04, Blocks 101, 102-127, 201-221)	(1)	(21,606)	(+3.42)
Subdistrict 5D	Laurens County Part Laurens Rural Division (less E.D. 49), Clinton Division, Joanna Division	(1)	(22,138)	(+5.97)